

No. 15010.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

CLIFFORD O. BOREN, DELTA M. BOREN and CLIFFORD O.  
BOREN CONTRACTING CO., INC.,

*Appellants,*

*vs.*

LLOYD M. TUCKER, Special Agent, Internal Revenue  
Service,

*Appellee.*

---

On Appeal From the Judgment of the United States District  
Court for the Southern District of California.

---

## BRIEF FOR THE APPELLEE.

---

CHARLES K. RICE,  
*Assistant Attorney General;*

LEE A. JACKSON,  
*Attorney,*  
Department of Justice,  
Washington 25, D. C.;

LAUGHLIN E. WATERS,  
*United States Attorney;*

EDWARD R. McHALE,  
*Assistant United States Attorney,*  
*Chief, Tax Division;*

THOMAS J. SULLIVAN,  
*Attorney, Internal Revenue Service,*  
808 Federal Building,  
Los Angeles 12, California;  
*Attorneys for Appellee.*

FILED

JUL -5 1956

PAUL P. O'BRIEN, CLERK



## TOPICAL INDEX

	PAGE
Opinion below .....	1
Jurisdiction .....	1
Questions presented .....	2
Statutes involved .....	3
Statement .....	3
Summary of argument.....	9
Argument:	

### I.

The District Court properly held the appellants, a corporation, and its responsible officers, in civil contempt for wilfully failing and refusing to obey the Court's order compelling appellants to produce for examination and copying by photographic means corporate documents and checks summoned by a special agent of the Internal Revenue Service in connection with his investigation of the income tax liability of two individuals, the officers.....	11
A. The examination into the income tax liability of Delta M. Boren and Clifford O. Boren for the years 1950 and 1951, which commenced November 2, 1953, never terminated and is still continuing.....	11
B. The evidence supports the findings that the making of photographic reproductions of payroll checks of appellant corporation is material, relevant and necessary to Special Agent Tucker's investigation.....	14
C. The order appealed from is the Court's own, for a contempt committed in the presence of the Court.....	15
D. The appellants have never stated any legally sufficient reason for their refusal to produce the books, records, and checks summoned.....	18

II.

The District Court properly ordered appellants to produce certain records for photographing by the appellee.....	2
--	---

III.

The fact that evidence uncovered by a Treasury Agent in a tax investigation may later be brought out in the criminal case does not negate or restrict the agent's authority as a delegate of the Secretary to examine and summon documents and persons under Section 7602, Internal Revenue Code of 1954.....	25
---	----

Conclusion .....	29
------------------	----

Appendix. Statutes involved .....	App. p. 1
-----------------------------------	-----------

## TABLE OF AUTHORITIES CITED

CASES	PAGE
Chapman v. Goodman, 219 F. 2d 802.....	28
Donnelly v. United States, 201 F. 2d 826.....	17
Falsone v. United States, 205 F. 2d 734, cert. den., 346 U. S. 864 .....	26, 28
Gretsky v. Basso, 136 Fed. Supp. 640.....	28
International Brotherhood of Teamsters, Local 174 v. United States, ..... F. 2d ....., 1956 C. C. H. Standard Fed. Tax Rep., Vol. 5, par. 9,136.....	17
Kann v. Commissioner, 210 F. 2d 347.....	14
Kobey v. United States, 208 F. 2d 583.....	16
Martin v. Chandis Securities Co., 34 Fed. Supp. 478, aff'd, 128 F. 2d 731.....	15, 16
Mosca v. United States, 174 F. 2d 448.....	16
Peoples Deposit Bank & Trust Co. v. United States, 212 F. 2d 86, cert. den., 348 U. S. 838.....	15, 28
Schulman v. Dunlap, 105 Fed. Supp. 104.....	15, 28
Tucker v. Hubner, 129 Fed. Supp. 110.....	28
United States v. Del L. Brandow, Charles D. Ford, et al., So. Dist. Calif., No. 24955-CD.....	4
United States v. First National Bank of Mobile, 295 Fed. 142, aff'd per curiam, 267 U. S. 576.....	14
United States v. Kraus, 270 Fed. 578.....	24
United States v. O'Connor 118 Fed. Supp. 248.....	26
Westside Ford v. United States, 206 F. 2d 627.....	23
Wood, In re, 130 Fed. Supp. 121.....	28

## RULES

Rules of the United States Court of Appeals, Ninth Circuit, Rule 18(d) .....	16
---	----

# iv.

STATUTES	PAGE
Internal Revenue Code of 1939, Sec. 3748(a).....	13
Internal Revenue Code of 1954 (68A Stat. 873, et seq.):	
Sec. 6501 .....	25
Sec. 6501(a) .....	12
Sec. 6501(c) (2) .....	13
Sec. 6653 .....	25, 26
Sec. 7402 .....	1
Sec. 7402(a) .....	21
Sec. 7402(b) .....	17, 21
Secs. 7601-7606 .....	25
Sec. 7602 .....	1, 9, 10, 22, 24, 25, 26
Sec. 7603 .....	1
Sec. 7604 .....	1
Sec. 7605 .....	1
Sec. 7605(b) .....	9, 13, 20
United States Code, Title 28, Sec. 1291.....	2
United States Code, Title 28, Sec. 1340.....	2
United States Code, Title 28, Sec. 1345.....	2
United States Code Annotated, Title 50, App., Sec. 2155(a).....	24
United States Constitution, Fourth Amendment.....	24

## TEXTBOOK

4 Prentice-Hall Federal Taxes, par. 72,362.....	17
---	----

No. 15010.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

CLIFFORD O. BOREN, DELTA M. BOREN and CLIFFORD O.  
BOREN CONTRACTING CO., INC.,

*Appellants,*

*vs.*

LLOYD M. TUCKER, Special Agent, Internal Revenue  
Service,

*Appellee.*

---

On Appeal From the Judgment of the United States District  
Court for the Southern District of California.

---

## BRIEF FOR THE APPELLEE.

---

### Opinion Below.

The District Court filed no formal opinion.

### Jurisdiction.

This is an appeal from a judgment holding that appellants were in civil contempt of the District Court for not complying with the order of Court enforcing three summonses issued under the authority of Section 7602 of the Internal Revenue Code of 1954, 68A Statute 901, by a special agent of the Internal Revenue Service requiring the production of certain records in connection with the investigation of two taxpayers. [R. 76-79.] Jurisdiction was conferred on the District Court by Sections 7402, 7602, 7603, 7604, 7605 of the Internal Revenue

Code of 1954, 68A Statute 873, 901, *et seq.*, and 28 U. S. C., Secs. 1340, 1345.

The Judgment of Civil Contempt and Order Committing the Respondents, Delta M. Boren and Clifford O. Boren to Custody (and fining the respondent Clifford O. Boren Contracting Co., Inc.) was filed on December 13, 1955, and docketed and entered on December 15, 1955. [R. 79.] A notice of appeal dated December 13, 1955, was filed on December 16, 1955. [R. 81.] Although the notice of appeal states appeal is taken from a final judgment entered on December 13, 1955, it is obvious that the notice can only refer to the final judgment of civil contempt filed that date but not entered until December 15, 1955. [R. 79-81, 197-199.] Jurisdiction is conferred on this Court by 28 U. S. C. Sec. 1291.

### Questions Presented.

I. Whether the District Court after a full hearing, properly held appellant corporation and its responsible officers in civil contempt for wilfully refusing to obey its order compelling them to produce for examination, copying, and photographing or photostating by the Internal Revenue Service, certain payroll checks and other records of the corporation which the District Court found to be material to, relevant to, and within the scope of a continuing inquiry into the tax liability of persons other than the corporation.

II. Whether a third person, a corporation, not the taxpayer under investigation, can be compelled to produce certain of its books, records, and payroll checks for



examination, copying, photographing or photostating, under the administrative summons procedures of the internal revenue laws.

III. Whether the Internal Revenue Service may proceed with an administrative investigation into a taxpayer's liability by using its subpoena powers over a third person, if the documents summoned might bring to light information eventually leading to a criminal prosecution of the taxpayer for tax evasion as well as to additional assessments against him for deficiencies in taxes and civil fraud penalties.

### **Statutes Involved.**

The pertinent statutes are printed in the Appendix, *infra*.

### **Statement.**

An examination into the income tax liability of Delta M. Boren and Clifford O. Boren for the calendar years 1950 and 1951 was commenced on November 2, 1953 by Internal Revenue Agent Charles D. Ford. [R. 50, 118.] Agent Ford requested that a special agent from the Intelligence Division be assigned to cooperate in the investigation on April 28, 1954. [R. 108.] Special Agent Lloyd Tucker was assigned to cooperate in the investigation on May 11, 1954, but didn't then commence investigating. [R. 11, 51, 108.] Ford resigned from the Internal Revenue Service on September 10, 1954. [R. 109, 113.] On October 6, 1954, Delta M. Boren reported to the Internal Revenue Service irregularities

on the part of Charles D. Ford after he left the service. \*<sup>[R. 108.]</sup> On the same date, Internal Revenue Agent Forrest P. Calkins was assigned to the case to resume the investigation of the tax liability of Delta M. Boren and Clifford O. Boren for the years 1950 and 1951. <sup>[R. 108.]</sup>

Agent Calkins proceeded to San Diego on October 18, 1954, and on October 20, 1954, with Special Agent Tucker commenced examining the liability of Delta and Clifford Boren for 1950 and 1951, starting from "scratch." <sup>[R. 109.]</sup>

On October 20, 1954, Special Agent Tucker stated to John Brant, attorney for the Borens and the Clifford O. Boren Contracting Co., Inc., hereinafter for convenience referred to as the Boren Company, that he wished to examine the proprietorship books and records maintained by Clifford O. Boren and Delta M. Boren for the years 1950 and 1951. <sup>[R. 11.]</sup> Mr. Brant advised that neither Special Agent Tucker nor Internal Revenue Agent Calkins could examine said records or hold any conversations with Mr. or Mrs. Boren. <sup>[R. 11-12.]</sup> On December 7, 1954, Special Agent Tucker for the first time asked permission to examine the records of the Boren Company in connection with the tax investigation of Clifford O. Boren and Delta M. Boren. <sup>[R. 12.]</sup> Permission to examine the corporate books and records

---

\*On April 25, 1956, subsequent to the docketing of this appeal, in *United States v. Del L. Brandow, Charles D. Ford, et al.*, So. Dist. of Calif., case No. 24955-CD, the Grand Jury returned an indictment against Charles D. Ford and others for conspiring to defraud the United States by endeavoring to sell information gained while a Government agent through the solicitation (made to Delta M. Boren) of employment for himself and others. Ford pleaded not guilty to the charge and the case is presently set for trial September 11, 1956.

was at first denied, but on December 15, 1954, Agents Tucker and Calkins commenced the examination of the records of the corporation. [R. 12.] During the course of the examination of the corporate records, on scattered intervals from December 15, 1954 to July 15, 1955, the Agents examined, among other things, the payroll checks of the Boren Company. [R. 13, 42, 51-52, 57.]

Preliminary investigation of the taxable years 1950 and 1951, of the Borens indicated to the agents that a sum in excess of \$40,000 of taxable income was not reported by the taxpayers though required by law. [R. 12, 50.] Agent Tucker was able to discover no evidence tending to show that this nondisclosure was due to mistake, inadvertence, or other justifiable legal reason, or tending to show that it was not done with the purpose and intent to evade and defeat the payment of the taxpayers' incomes. [R. 12, 51.] The statute of limitations extended by waiver barred any assessment of civil tax liability (other than fraud) for the year 1950 after June 30, 1955. [R. 55.] The statute of limitations on assessment of deficiencies (other than fraud) against the taxpayers for the year 1951 would have run on March 15, 1955. [R. 56.] Accordingly, because the taxpayers would not consent to further extensions of the statute of limitations, on March 11, 1955, the Commissioner issued notices of deficiency to the taxpayers for the years 1950 and 1951. [R. 55, 56, 131.]

Shortly after the issuance of notices of deficiency and on or about March 15, 1955, Special Agent Tucker was first informed that one of the persons carried as a salaried employee on the payroll of the Boren Company during the second half of 1951 was not a bona fide employee for much of that time, that certain payroll checks of the

Boren Company with respect to said employee were issued in excess of the actual compensation received by the employee and that the purported endorsements of the employee on the checks were forged. [R. 33-34, 52-53, 132.] Said employee was shown as a full-time employee for the latter half of 1951 on the corporate books and records but denied under oath that she worked more than ten or twelve days during said year. [R. 34.] All of said payroll checks also bore the endorsements of Delta M. Boren. [R. 34, 52.]

Special Agent Tucker had reasonable cause to believe that Delta M. Boren and Clifford O. Boren, or either of them, may have actually received and failed to report income which the books of the Boren Company showed to have been paid to an employee, all with the intent willfully to evade and defeat the payment of income taxes. [R. 53, 59, 61.]

Thereafter, Agent Tucker attempted to get permission from the Boren Company to make photographic or photostatic copies of the checks, endorsements included, in order to determine, with the aid of handwriting experts, the true maker of the endorsements. [R. 34, 35, 53, 58.] The Clifford O. Boren Contracting Co., Inc., its president, Clifford O. Boren, and its vice-president, Delta M. Boren, and its attorney, John Brant refused to make the checks available for this purpose. [R. 35, 130, 131.]

On August 25, 1955, summonses were issued by Special Agent Tucker to the Clifford O. Boren Contracting Co., Inc., to Clifford O. Boren as president thereof, and to Delta M. Boren as vice-president thereof, to appear before Agent Tucker in San Diego on September 6, 1955, in connection with the tax liability of Delta and Clifford Boren for the years 1950 and 1951 and to produce the

following records of the Clifford O. Boren Contracting Co., Inc.: General Journal, Cash Journal, General Ledger, Payroll Records and Payroll Checks, bearing the endorsements of any of the following named persons—Clifford O. Boren, Delta M. Boren, Marjorie H. Bell, Betty K. McCarthy, and the Clifford O. Boren Contracting Co., Inc., for the period from July 1, 1951 to December 31, 1951. [Petitioner's Ex. 1, pp. 6-8.]

At the time and place set for hearing, Delta M. Boren and Clifford O. Boren, president and vice-president respectively of the corporation, appeared with John A. Brant, their attorney and attorney for the Boren Company, but refused to produce the books, records, checks and other data summoned. [R. 54-55.] A petition to enforce the summonses was filed by Special Agent Lloyd Tucker in the District Court on September 19, 1955. [R. 8.] The petition was presented to Judge Harry C. Westover on September 19, 1955. [R. 9-10, 98.] Judge Westover chose to issue orders to show cause directed to the officers of the Boren Company rather than writs of attachment. [R. 98.] The orders to show cause were returnable before the District Court and pursuant thereto a hearing was held in the Southern Division before the Hon. Wm. C. Mathes, United States District Judge, on December 5, 1955. [R. 84-176.] At the conclusion of the hearing, at which testimony was taken, witnesses cross-examined, and evidence introduced, the Court made its findings of facts, conclusions of law and order with respect to the pleadings. [R. 48-63.] The order directed the Borens as officers of the Boren Company to appear before Special Agent Tucker on December 8, 1955, and to produce for examination, copying, and photostating the records called for in the summonses, and in the event of their failure so to do, to re-appear before the Court on



December 13, 1955, and show cause why they should not be held in civil contempt of the Court. [R. 63.]

Pursuant thereto, Clifford O. Boren and Delta M. Boren, representing the corporation, and the attorney, representing them and the corporation, appeared before Special Agent Tucker on December 8, 1955. [Ex. 1; R. 207-218.] The witnesses refused to produce the summoned books, records, and papers for examination, copying, and photostating, giving as reasons therefor, only the reasons stated in their answer to the petition filed in the action. [R. 208, 212-214.]

Thereafter, the Borens with their counsel returned before the Court in the morning of December 13, 1955, without the records and were ordered by the Court to return that same afternoon with the summoned records. [R. 189-190, 74-75.]

The witnesses, Delta M. Boren, vice-president of Clifford O. Boren Contracting Co., Inc., and Clifford O. Boren, president of said corporation, re-appeared before the Court that afternoon. They stated to the Court that they had with them the summoned books and records including the payroll checks. The Court then ordered them to deliver the 1951 records into the custody of the Clerk for examination, copying and photographing or photostating by Special Agent Tucker. [R. 192.] The Borens refused, giving as their only reason, "those set forth in the answer to the petition filed in this court." [R. 193.] The Court then made its judgment committing Clifford O. Boren and Delta M. Boren to the custody of the Marshal of the Court to be imprisoned in a jailtype institution until the affirmative order of the Court is obeyed. [R. 193, 76-79.] The Court also fined the corporation a compensatory fine of \$110.00. [R. 78.]

### Summary of Argument.

A special agent of the Internal Revenue Service here seeks to aid the investigation of the tax liability of Clifford O. and Delta M. Boren by the examination and photostating of certain specified records and documents belonging to a third party corporation. The corporation is controlled by Clifford O. Boren, president, and Delta M. Boren, vice-president, the taxpayers and subjects of the investigation. The corporation, through its officers, Clifford O. and Delta M. Boren, resists such examination on the grounds that the records have already been examined once by the Internal Revenue Service; that a further examination is unnecessary; that the examination permitted the Internal Revenue Service by Section 7602, Internal Revenue Code of 1954, does not encompass the photostating or photographing of the corporation's records; and that the examination contemplated under Section 7602 is not permitted where one of the admitted purposes is to secure evidence to be used in a later criminal prosecution.

The facts before the lower court show, and the court found that Special Agent Tucker's examination of the tax liability of Clifford O. and Delta M. Boren never terminated and is still continuing. That being so, there is no "re-examination" of the Boren's tax liability within the meaning of Section 7605(b) of the Internal Revenue Code.

The evidence introduced at the hearing supports the finding that the making of photostatic reproductions of payroll checks of appellants was necessary to the investigation, in that Special Agent Tucker found evidence that payroll checks of the corporation were being issued, endorsements being forged, checks cashed, and the proceeds

going not to the payee but to the taxpayers, subjects of the investigation. The evidence shows there was reasonable cause for the agents to suspect and investigate for fraud. The statute of limitations provides no limitation period as to tax deficiencies due to fraud.

The refusals of appellants to produce specified records and documents for examination and photostating were clearly contemptuous acts committed in the presence of the court, and the court's judgment committing Clifford O. and Delta M. Boren and fining the corporation was proper.

The order of the court requiring appellants to produce certain records for photographing does not exceed the statutory authority given by Section 7602, Internal Revenue Code of 1954, in that it is only reasonable to interpret the authority to examine complicated books of account to include the right to copy or photograph the same.

The fact that evidence uncovered by a Treasury agent in response to a summons may later be used in a criminal proceeding, does not restrict the agent's authority to examine witnesses and summon documents and persons under Section 7602, Internal Revenue Code of 1954.



## ARGUMENT.

### I.

The District Court Properly Held the Appellants, a Corporation and Its Responsible Officers, in Civil Contempt for Wilfully Failing and Refusing to Obey the Court's Order Compelling Appellants to Produce for Examination and Copying by Photographic Means Corporate Documents and Checks Summoned by a Special Agent of the Internal Revenue Service in Connection With His Investigation of the Income Tax Liability of Two Individuals, the Officers.

A. The Examination Into the Income Tax Liability of Delta M. Boren and Clifford O. Boren for the Years 1950 and 1951, Which Commenced November 2, 1953, Never Terminated and Is Still Continuing.

The investigation of the tax liability of Delta M. Boren and Clifford O. Boren for 1950 and 1951 started as a civil investigation. During its course, Ford, the internal revenue agent first assigned to the case, asked that a special agent (who has cognizance of civil and criminal fraud) also be assigned to the case. A special agent, the appellee Tucker, was assigned, but did not actually get involved in the investigation until after the original revenue agent had resigned, been accused of misconduct by one of the appellants, and a new internal revenue agent assigned to take over the investigation. In the circumstances of Delta Boren's accusation, the new internal revenue agent, Calkins, started from "scratch."

The two agents, working under threatening bars of limitations on civil assessments for 1950 and 1951, of three and six months at most (March 15, 1955, and June 30, 1955) proposed substantial deficiencies against Delta

and Clifford Boren for both years. Int. Rev. Code of 1954, Sec. 6501(a). The Commissioner of Internal Revenue accordingly issued on March 11, 1956, notices of deficiency for taxes and fraud penalties within the three year period of limitations as extended by waiver.

Just after that, about March 15, 1955, Special Agent Tucker first learned of additional probable fraudulent evasion of income taxes by Delta and Clifford Boren for 1951 achieved by falsifying Boren Company payroll checks and forging an employee's endorsements. In order to determine the verity of the information and to determine whether then to impose additional civil fraud sanctions or to recommend criminal prosecution, he sought to obtain photographic or photostatic copies of the payroll checks. The Boren Company and its officers, Delta and Clifford Boren resisted. This proceeding ensued, culminating in the final order in civil contempt committing to custody Delta and Clifford Boren until they comply, and fining the corporation, from which they all appeal. Execution of the judgment has been stayed pending appeal.

At no time did the investigation terminate or conclude. At the time Agent Ford resigned, Tucker, another type of Treasury agent, a Special Agent, having cognizance of fraud, had already been assigned to cooperate, but had not yet begun his phase of the investigation. After Ford's resignation and upon complaint to the Internal Revenue Service by Delta Boren about irregularities by Ford, another Internal Revenue Agent, Calkins, was assigned to the case, who, because of the taxpayer's accusations, did his own work from "scratch." This was not a "re-examination," but a continuance of an existing examination, albeit a fresh start, in view of the taxpayer's accusations. By refusing to rely on the pre-

liminary work of the "suspect" former agent, Ford, the Government leaned over backwards not to prejudice the taxpayers.

There had been no determination, one way or another, of deficiency or no deficiency prior to Calkins' assignment to the case. Certainly Tucker could not have completed his examination as he hadn't even started.

On March 11, 1955, notices of deficiency were sent out because of the imminent running of the statute of limitations. But the cases were not closed. On the contrary, Special Agent Tucker had almost simultaneously learned of facts indicating more fraud. As long as fraud was involved, the Government was not precluded from assessing additional deficiencies based thereon and no statute of limitations barred assessment. Int. Rev. Code of 1954, Sec. 6501(c)(2). In addition, criminal prosecution was and is a possibility, as with respect thereto a six year statute is operative. Int. Rev. Code of 1939, Sec. 3748(a).

In August, 1955, the summonses, subject of this proceeding, were issued in this continuing investigation. Therefore, the evidence clearly supports the finding [XXIII, R. 58] that:

"The Tax investigation of the Borens commenced in November, 1953 and continued without interruption or termination since that date, and is still continuing."

There has been no "re-examination" of the Borens' tax liability within the meaning of Internal Revenue Code, Section 7605(b), and the conditions precedent thereto therein contained are inapplicable to this investigation of the books and records of a person other than the taxpayer.

**B. The Evidence Supports the Findings That the Making of Photographic Reproductions of Payroll Checks of Appellant Corporation Is Material, Relevant and Necessary to Special Agent Tucker's Investigation.**

Special Agent Tucker had specific information that payroll records of the appellant Boren Company were falsified and had reason to believe proceeds of the falsification had been diverted to Clifford or Delta Boren and not reported by them in their income tax returns.

Delta and Clifford Boren are the owners and officers in control of the Boren Company, and if false payroll checks were issued and cashed by their forging the endorsements, and if the proceeds were received by them, such proceeds could be taxable income. *Kann v. Commissioner*, 210 F. 2d 347 (3rd Cir., 1953).

To determine whether or not such income was received by the plaintiffs, a determination as to who actually endorsed the payroll checks is important.

Where a bank objected to an agent's summons on the grounds that its entries were immaterial and inadmissible as to the taxpayers, the court held that evidence of moneys passing through a person's hands while not always income, is evidence from which income can be inferred, and does tend to show income. *United States v. First National Bank of Mobile*, 295 Fed. 142 (S. D. Ala., 1924), *aff'd per curiam*, 267 U. S. 576 (1925).

A further, incidental, and nonetheless important result might be the determining the existence of an element of wilfulness in connection with *both* civil and criminal fraud.

The cases generally say the agent must merely indicate he has reason to believe there are grounds for fraud

when an investigation extends beyond the years open to a civil investigation. Tucker did far more; he laid all his cards on the table. He had reason to believe there was fraud and has candidly stated his reasons. The Court properly found them sufficient and that fraud is the issue of the inquiry. [Findings of Fact VI, VII, X, XXII, XXV; Conclusions of Law IV, V; R. 50 *et seq.*]

**C. The Order Appealed From Is the Court's Own, for a Contempt Committed in the Presence of the Court.**

Where there is a fraud investigation, as here, and the statute of limitations otherwise would have barred an assessment, as here, and the agent's summons relates to evidence of persons other than those under investigation, as here, the investigation will be sustained if the agent has information indicating possible fraud. *Peoples Deposit Bank & Trust Co. v. United States*, 212 F. 2d 86 (6th Cir., 1954), *cert. denied*, 348 U. S. 838; *Schulman v. Dunlap*, 105 Fed. Supp. 104 (S. D. N. Y., 1952).

Though under the rule of the above cases Tucker would only have been required to have stated he had suspicion of fraud and the District Court was not obliged to require proof of facts showing that the tax returns of the Borens were false and fraudulent, here he went much further and freely offered evidence of the facts showing his reasonable grounds. Here the evidence proffered satisfied the Court that the agent had reasonable grounds to suspect fraud, and is thus, on this ground alone, distinguished from the case of *Martin v. Chandis Securities Co.*, 34 Fed. Supp. 478 (S. D. Cal., 1940), *affirmed*, 128 F. 2d 731 (9th Cir., 1942).



In the *Martin* case, the Court of Appeals affirmed the District Court's refusal to enforce a summons where neither the petition nor the affidavits showed any reasonable ground of fraud to reopen a case ten years after the taxable year in question. Here the Court found the agent had reasonable grounds to suspect fraud and to continue his investigation despite the running of statute of limitations during the investigation's progress. The findings of the trial court must be sustained unless clearly erroneous. Here, they are supported by substantial evidence. Moreover, here they are not even subject to attack because the appellants are in default of Rule 18(d) of this Court. They have not in their brief made any specification of errors. It follows that they have not complied with the provisions requiring errors in findings of fact and conclusions of law be stated with particularity. The pertinent portions of the rule are as follows:

"18(d) In all cases a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged. \* \* \* In all cases, when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous. \* \* \*" Cf., *Kobey v. United States* 208 F. 2d 583 (9th Cir., 1953); *Mosca v. United States*, 174 F. 2d 448, 451 (9th Cir., 1949).

Tucker, the complaining agent, at a full formal hearing proved to the satisfaction of the court that the examination, copying, photographing or photostating of the

Boren Company's payroll checks was necessary, reasonable and within the scope of the investigation.

*Cf. Local 174, International Brotherhood of Teamsters v. United States*, ..... F. 2d ..... (9th Cir., 1955); 1956 C. C. H. Standard Federal Tax Reporter, Vol. 5, par. 9136; 1956 P. H. Federal Taxes, Vol. 4, par. 72,362.

Here the District Court complied fully with the criteria later set forth by this Court in its decision in the *Teamsters* case. The District Court, after full and extensive hearing, determined the propriety of the summons and exercised "its independent judgment as to what documents of entries were relevant."

The District Court, under the authority of Section 7402(b) of the Code, acted by "appropriate process" (orders to show cause, and later, direct orders) to "compel such attendance, testimony, or production of books, papers, or other data."

The refusals of the Borens, officers of the Boren Company, to obey the orders of Judge Mathes of December 13, 1956, to produce for examination, copying and photostating or photographing the summoned books and records, were clearly contemptuous acts, committed in the presence of the Court. [R. 74, 192-196.] The judgment committing Delta and Clifford Boren and fining the Boren Company was proper and should be affirmed. *Cf. Donnelly v. United States*, 201 F. 2d 826 (9th Cir., 1953).

**D. The Appellants Have Never Stated Any Legally Sufficient Reason for Their Refusal to Produce the Books, Records, and Checks Summoned.**

After a full and complete trial on December 5, 1955, on the petition of Special Agent Tucker and the answer of the appellants, the District Court filed on December 7, 1955, its findings of fact and conclusions of law and order compelling the officers of the Boren Company to comply with the Internal Revenue Service summonses. At the hearing before Special Agent Tucker on December 8, 1955, pursuant to said order, the appellants in refusing to obey said order of Court stated as their only grounds therefor that they relied on those grounds set forth in their answer to the petition filed in the action on November 10, 1955. The same responses were made to Judge Mathes on their return before him on December 13, 1955. He deemed the reasons insufficient for their refusal then to comply with his order and adjudged them in contempt. The Court had heard all the testimony and evidence, found that the investigation was necessary and proper, that the documents and checks summoned were necessary and that the agent was entitled to have them photographically copied.

The so-called defenses raised by the witnesses in their petition and later solely relied upon as grounds for their refusals to obey, were, first, a denial of the allegations of the petition. That was disposed of by the Court after its hearing in the Findings. [R. 49-55.]

The "second" alleged defense was that one inspection of the books of account of the Boren Company had



been made in connection with the tax liability of Clifford O. Boren and Delta M. Boren for 1950 and 1951. [R. 19.] The Court struck that defense finding it insufficient as a matter of law. [R. 75-76.] There is no provision of law barring more than one inspection of a witnesses' books in connection with a continuing investigation of another person's tax liability.

The "third" defense alleged apparently was that the tax liability of the Borens' for the years in question had been determined. [R. 24-26.] The Court on December 7, 1955, properly found to the contrary. [Finding XVIII, R. 56.]

The "fourth" defense was labeled "Failure to Utilize prior opportunity." [R. 26.] No such doctrine exists at law but nevertheless the Court found as a matter of fact that the special agent was at all times denied permission to photostat or photograph the payroll checks, exact copies of which were necessary to the continuance of the examination. [Findings XIX, XX, R. 56-57.]

As a "fifth" defense, the appellants urged that the examination seeks information for criminal prosecution and not ascertainment of tax liability. [R. 26.] Another section of this brief, Part III, points out the insufficiency of this defense as a matter of law. Moreover, as a matter of fact, the Court found that the purpose of Tucker's examination was both to determine the correctness of the tax returns filed by the Borens with respect to the possible assertion of additional assessments by reason of fraud and fraud penalty assessments, and to

determine possible criminal tax liability of the Borens. [Finding XXII, R. 58.]

For the "sixth" defense, the appellants alleged a requirement of a notice of additional inspection. [R. 27.] This apparently is premised on Section 7605(b) of the Internal Revenue Code which provides "only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary." However, the Court found that the investigation of the Borens was one continuing investigation. Moreover, said section refers to "taxpayer's" books of account. The defense is attempted to be asserted here in behalf of the third person, the corporation and the corporate books, records, papers, and checks. The statutory condition is not pertinent to the corporation, a third person witness. The Court properly concluded this was a reasonable and necessary investigation.

As a "seventh" defense, the appellants alleged that the Commissioner had made a determination of the tax liability of Delta Boren and Clifford Boren and, therefore, it was no longer necessary to conduct an examination to ascertain the correctness of their returns. [R. 28-29.] The Court considered that defense and as a result of its hearing on December 5, 1955, determined that Special Agent Tucker had reasonable grounds to believe that the returns filed were not correct and the taxpayers "have additional liabilities with respect to civil fraud and may be liable under the criminal laws of the United States for filing false or fraudulent returns." [Finding XXV, R. 59.]

Likewise, for their “eighth” defense, the appellants claimed that the records were not material. [R. 29.] The Court found, Finding XXVI [R. 59-60], that the records were material and relevant. In any event, as a matter of law, the third person, the corporation, cannot object to the scope of an examination.

The “ninth” defense which alleged lack of probable cause for the issuance of the summonses was struck by the Court as not being a requirement contained in Internal Revenue Code. [R. 29-30, 75-76.] In addition, as a matter of fact, the petition was verified [R. 8] and the probable cause was certainly demonstrated to the Court during the course of the proceedings for the production of the documents.

The Court further found, Finding XXVII [R. 60], that the appellants failed to sustain any of their separate defenses.

To summarize, the appellants are here branded with contumacious conduct for failing and refusing to obey the orders of the Court to produce for examination, copying, photographing or photostating the checks, and in giving as their only grounds for such conduct the same grounds theretofore considered at length by the Court and by it deemed insufficient after full and complete hearing. No claims of privilege were here invoked, or could be invoked. The District Court, in view of its powers under Section 7402(a) and (b) of the Internal Revenue Code, properly dealt with the obdurate refusal and stubbornness of appellants.

II.

**The District Court Properly Ordered Appellants to Produce Certain Records for Photographing by the Appellee.**

Section 7602, Title 26, U. S. C. (1954, Int. Rev. Code) provides that,

“the Secretary or his delegate is authorized—

(1) To *examine* any books, papers, records or other data which may be relevant or material to such inquiry;

(2) To summon . . . any person having possession . . . of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to *produce* such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry.” (Emphasis supplied.)

While this section does not specifically state and enumerate in exact detail what means may be employed by the Secretary or his delegate to make use of the books, records and papers which may be summoned under the statute, it certainly contemplates that the books, records and papers may be inspected and a reasonable means used to record or preserve the pertinent parts inspected.

The District Court found, as a conclusion of law, that the appellee, Special Agent Lloyd M. Tucker, had reasonable cause to believe that certain checks of the appellant,

Boren Company were falsified or forged and that the proceeds were received by the taxpayers, Delta M. and Clifford O. Boren, whose income tax returns were being investigated by Agent Tucker. [R. 61.] The Court's conclusion was supported by evidence consisting of the affidavit of Special Agent Tucker, which was received in evidence in lieu of his testimony on direct examination, but subject to cross-examination. In his affidavit Special Agent Tucker testified to facts ascertained during the investigation which caused him to believe that certain payroll checks had been falsified or forged, and that it was necessary for him to photograph or photostat these checks in order to have an expert analyze the handwriting thereon. [R. 34-35.]

The authority to summon books and documents, given by Congress to the Secretary or his delegate, would be hollow and meaningless if the agents were not allowed to record for their use the information appearing on the books and documents. A diligent search has revealed no cases specifically on this point of recordation in regard to the authority of the Secretary or Commissioner of Internal Revenue to examine and require the production of documents under the Internal Revenue Code. There is, however, a case decided by this court affirming an order of a District Judge requiring production of records for photographing in connection with an Office of Price Stabilization investigation. *Westside Ford v. United States*, 206 F. 2d 627 (9th Cir., 1953). The statute

under which a summons was issued by the OPS, 50 U. S. C. A., Appendix 2155(a), is similar to Section 7602, Title 26, U. S. C. The interpretation of this statute was commented on by this court at page 634 of 206 F. 2d 627, as follows:

“We are not impressed with the argument. The construction urged by appellant would mean that investigators may look at documents but may not record what they see; that they must commit to memory hundreds of documents, with long columns of figures, to determine complex questions whether the regulations have been violated or evaded. This *reductio ad absurdum* is a sufficient answer to appellant’s argument. Rightly construed Section 2155(a) gives the President or his appointees discretion as to the *means* of investigation as well as the subjects of investigation.”

Appellant in his brief (Br. 25) cites the case of *United States v. Kraus*, 270 Fed. 578 (S. D. N. Y., 1921), as his only authority for the proposition that his records could not be photographically reproduced by the Secretary or his delegate under Section 7602, Internal Revenue Code of 1954. The *Kraus* case is, however, not in point in that it is a case involving the question of illegal search and seizure. In the *Kraus* case Judge Learned Hand suppressed evidence which was illegally seized without a search warrant by prohibition agents, and in the same case refused to suppress evidence seized incident to an arrest. The present case does not in any way involve an illegal search and seizure in violation of the Fourth Amendment, but involves the production by legal process of the records of a third party.



### III.

The Fact That Evidence Uncovered by a Treasury Agent in a Tax Investigation May Later Be Brought Out in the Criminal Case Does Not Negate or Restrict the Agent's Authority as a Delegate of the Secretary to Examine and Summon Documents and Persons Under Section 7602, Internal Revenue Code of 1954.

Section 7602 authorizes the Secretary or his delegate to examine books and other data "for the purpose of ascertaining the correctness of any return . . . determining the liability of any person for any internal revenue tax . . . or collecting such liability. . . ." Special Agent Tucker and Revenue Agent Calkins investigated the tax liability of Clifford O. and Delta M. Boren. [R. 11, 33.] As duly authorized agents of the Treasury Department, they were authorized to conduct such investigation by Sections 7601 to 7606, inclusive, Internal Revenue Code of 1954. In the course of the investigation of a taxpayer, Treasury agents are required to investigate and report any evidence of fraud with intent to evade taxes. Fraud has a definite bearing on tax liability in that a fifty per cent addition to the tax is applied by Section 6653, Internal Revenue Code of 1954, and with respect thereto there is no statute of limitations as to assessment and collection (Sec. 6501, Int. Rev. Code of 1954).

Special Agent Tucker has stated that he was primarily concerned with the investigation of alleged evasion of tax. [R. 11]. Tucker further testified that his examination was being conducted for the purpose of investigating possible criminal prosecution. [R. 117.] Special Agent Tucker also stated that his investigation was not yet

complete [R. 13], and therefore he has not completed his report or made any recommendation to his superiors, which recommendation could possibly be that the fifty per cent addition under Section 6653 be imposed and that criminal prosecution be not recommended to the Department of Justice. Special Agent Tucker is not an arm of the grand jury, or an arm of the Department of Justice, which is charged with the prosecution of Federal criminal cases.

Appellant has cited (Br. 27) the case of *United States v. O'Connor*, 118 Fed. Supp. 248 (D. C. Mass., 1953), for the proposition that the authority to require production of books and papers under Section 7602, Internal Revenue Code of 1954, cannot be used for the purpose of securing evidence for criminal prosecution. The facts in the *O'Connor* case show that the Treasury agents had completed their investigation and submitted their report to their superiors, which report in due course was referred to the Department of Justice and an indictment thereafter was returned by a grand jury. The special agent frankly admitted that the purpose of the *O'Connor* summons was to secure information for the criminal trial. *O'Connor* was clearly a case of the agent attempting to use a Commissioner's summons to obtain evidence in aid of a pending criminal prosecution in a case under indictment, and not for the purpose of determining tax liability. As the Court correctly pointed out, the grand jury could easily have compelled the production of the records in advance of trial. In the present case, the agents are still investigating and there is no indictment or pending criminal trial. The Fifth Circuit, in *Falsone v. United States*, 205 F. 2d 734 (5th Cir., 1953), *cert. denied*, 346 U. S. 864, discusses the Commissioner's



summons and the difference between it and the grand jury subpoena, on page 737, as follows:

“The power granted to the Commissioner of Internal Revenue by 26 U. S. C. A., Section 3614 is inquisitorial in character and has been compared to the power vested in federal grand juries. *Bolich v. Rubel*, 2d Cir., 67 F. 2d 894, 895; *Brownson v. United States*, 8 Cir., 32 F. 2d 844, 848. An important difference, however, is that, while the reports of grand juries are made to the court, the results of tax investigations are reported to the Commissioner and it is for him to determine what action, if any, is required under the law in view of the facts revealed.”

When a matter is under investigation by Treasury agents and no recommendation has yet been made to the Department of Justice or other proper agency as to criminal prosecution, the investigation is primarily an administrative tax investigation. The agents are attempting to determine taxpayer's correct tax liability. One of the basic and necessary tools given to the Treasury investigators by Congress is the authority to summon witnesses and documents. If, in the course of the investigation or at the completion thereof, the facts and the evidence indicate to the agents that a crime has been committed, they are then under a duty to recommend criminal prosecution and recommend to the Commissioner that the case be forwarded to the Department of Justice. The possibility that criminal violations may be encountered is present in every investigation and to contend that the summons should not be employed to obtain evidence which may later be used in a criminal case is to make the summons a worthless tool.

Most of the cases upholding the validity of an administrative summons under the Internal Revenue Code have involved summonses issued by special agents rather than by revenue agents or collection officers. Since the primary duty of a special agent is to investigate tax evasion and fraud [R. 11], the courts must have contemplated that any evidence uncovered in response to the summonses might very possibly be introduced at a later criminal trial, should one be instituted on tax evasion charges. All the following cases have involved summonses issued by special agents:

*Chapman v. Goodman*, 219 F. 2d 802 (9th Cir., 1955);

*Peoples Deposit Bank v. United States*, 112 Fed. Supp. 720 (E. D. Ky., 1953), *affd.* 212 F. 2d 86, *cert. denied*, 348 U. S. 838;

*Falsone v. United States*, *supra*;

*Tucker v. Hubner*, 129 Fed. Supp. 110 (S. D. Cal., 1955), appeal docketed No. 14704 (9th Cir.), Feb. 24, 1955 and argued and submitted Nov. 7, 1955;

*Gretsky v. Basso*, 136 Fed. Supp. 640 (D. C. Mass., 1955);

*Schulman v. Dunlap*, 105 Fed. Supp. 104 (S. D. N. Y., 1952);

*In re Wood*, 130 Fed. Supp. 121 (W. D. Ky., 1955).

### Conclusion.

The judgment of the District Court committing Delta and Clifford Boren, the responsible officers of the Clifford O. Boren Contracting Co., Inc., to the custody of the United States Marshal until they shall obey the order of the Court compelling them to produce for examination, copying and photostating the summoned corporate books, records, and payroll checks, and fining the corporation a compensatory fine of \$110.00, should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,

*United States Attorney,*

EDWARD R. McHALE,

*Asst. United States Attorney,  
Chief, Tax Division,*

THOMAS J. SULLIVAN,

*Attorney,  
Internal Revenue Service,  
Attorneys for Appellee.*

CHARLES K. RICE,

*Assistant Attorney General,*

LEE A. JACKSON,

*Attorney.*

July, 1956.







## APPENDIX.

### Internal Revenue Code of 1954.

#### SECTION 6501.

#### Sec. 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION.

(a) GENERAL RULE.—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, within 3 years after such tax became due, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

\* \* \* \* \*

#### (c) EXCEPTIONS.—

(1) FALSE RETURN.—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) WILLFUL ATTEMPT TO EVADE TAX.—In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(68A Stat. 803)

\* \* \* \* \*

(4) EXTENSION BY AGREEMENT.—Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the Secretary or his delegate and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(68A Stat. 804)

#### SECTION 6653.

##### Sec. 6653. FAILURE TO PAY TAX.

(b) FRAUD.—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a).

(68A Stat. 822)

#### SECTION 7402.

##### Sec. 7402. JURISDICTION OF DISTRICT COURTS.

(a) TO ISSUE ORDERS, PROCESSES, AND JUDGMENTS.—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and



decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) TO ENFORCE SUMMONS.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

(68A Stat. 873)

## SECTION 7602.

### SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody or care of books of account

containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(68 Stat. 901)

#### SECTION 7603.

##### Sec. 7603. SERVICE OF SUMMONS.

\* \* \* When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

(68A Stat. 902)

#### SECTION 7604.

##### Sec. 7604. ENFORCEMENT OF SUMMONS.

(a) JURISDICTION OF DISTRICT COURT.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) ENFORCEMENT.—Whenever any person summoned under section 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(68A Stat. 902)

SECTION 7605(b).

Sec. 7605. TIME AND PLACE OF EXAMINATION.

\* \* \* \* \*

(b) RESTRICTIONS ON EXAMINATION OF TAXPAYER.—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

(68A Stat. 902)

